Divorce, QDRO, Retirement, Death: Not Necessarily in That Order

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In this article, Blankenship discusses the requirements for qualified domestic relations orders (QDROs), and he explains how courts have treated QDROs that purportedly assign survivor benefits to a former spouse and are filed after the retirement or death of the retirement plan participant.

Property to be divided as part of a divorce or legal separation often includes an interest in a qualified retirement plan. A state court will generally approve or impose an appropriate allocation of the available retirement benefits between the divorcing parties in the form of a domestic relations order (DRO). However, the DRO will generally not be enforceable unless it is a "qualified" DRO, more commonly known as a QDRO.[1] The primary purpose of a QDRO is to specify the timing and amount of plan payments to the participant's spouse (or former spouse) and the participant's children or other dependents.[2] To accomplish this purpose, the tax law requires that a QDRO meet conditions set forth in the code.[3]

Except under a qualified governmental plan or a qualified church plan,[4] a QDRO generally may not provide any benefit or option not otherwise available under the plan.[5] Nor may such a QDRO require payment of benefits with a value greater than the value of benefits otherwise provided under the plan.[6] Also, the QDRO may not change any payments that the plan must make to another individual (for example, another former spouse) under the provisions of a previous QDRO.[7]

A QDRO will usually allocate some or all of a participant's lifetime benefits in a plan to a former spouse or children of the participant. A QDRO may also designate a former spouse as the spouse entitled to receive the survivorship benefits from a plan.[8] However, the designation must be explicit[9] and the QDRO may not designate non-spouse beneficiaries, such as children, to receive the survivorship benefits.[10]

Generally, the retirement benefits assigned to a former spouse under a QDRO will override the claims of a current spouse if the QDRO is filed with the plan before the retirement or death of the participant. However, the law is less clear if a QDRO attempts to assign survivor benefits to a former spouse, and the QDRO is filed after the

[1] Sections 401(a)(13)(B) and 414(p)(9).

[2] Section 414(p)(1)(A)(i) and (p)(1)(B).

[3] *See* section 414(p) generally.

[4] Section 414(p)(11).

[5] Section 414(p)(3)(A).

[6] Section 414(p)(3)(B).

[7] Section 414(p)(3)(C).

[8] Section 414(p)(5); reg. section 1.401(a)-13(g)(4).

[9] *Dorn v. IBEW*, 211 F.3d 938 (5th Cir. 2000) (QDRO allocated a portion of participant's lifetime qualified joint and survivor annuity (QJSA) payments to the former spouse, but failed to allocate to the former spouse any portion of the QJSA survivor benefits payable to the current spouse).

[10] *Hamilton v. Washington State Plumbing and Pipefitting Industry Pension Plan*, 433 F.3d 1091 (9th Cir. 2006). If the welfare of the participant's children is a concern, perhaps the best the participant can do is to agree to the designation of his or her former spouse as the beneficiary of the survivorship benefits, in the expectation their children will thereby benefit. The alternative is to attempt to obtain a present or future spouse's consent to make the children the survivorship beneficiaries.

retirement or death of the participant. Those situations must deal with the tension between the former spouse's rights under the QDRO and the current spouse's usual right to receive survivor benefits.

Before analyzing those situations, it will be helpful to review the requirement imposed on most plans to provide annuities for surviving spouses.

Plans Required to Provide Annuities for Surviving Spouses

Spousal annuity requirements apply generally to most qualified retirement plans.[11] However, the requirements do not apply to qualified governmental plans, qualified church plans, or some section 403(b) plans.[12] Nor do the requirements generally apply to participants in profit-sharing or stock bonus plans if rigorous conditions are met.[13]

When spousal survivor annuity requirements do apply, a plan must make provision for two different types of annuities: (1) a qualified joint and survivor annuity (QJSA), and (2) a qualified pre-retirement survivor annuity (QPSA).[14] A QJSA is the applicable form if an annuity starts before a participant's death (for example, at retirement). A QPSA is the applicable form if the annuity starts after the participant's death (for example, at death before retirement).[15]

Qualified Joint and Survivor Annuity

A QJSA is an annuity payable to a participant for the participant's lifetime and, after the participant's death, to his or her spouse for the spouse's lifetime.[16] The amount of the annuity payments to a surviving spouse may range from 50 percent to 100 percent of the amount of the payments to the participant during his lifetime.[17] The exact percentage is determined by the terms of the plan.

A plan must generally begin paying a QJSA to the participant by the 60th day after all the following conditions are met:

1. the participant has completed 10 years of participation in the plan;[18]
2. the participant has reached age 65, or the plan's normal retirement age if earlier;[19] and
3. the participant has terminated service with the employer sponsoring the plan.[20]

A QJSA must be "actuarially equivalent" to a lifetime annuity payable to the participant alone. Thus, the QJSA must have a present value that is at least equal to the present value of a normal single life annuity available to the participant (or the value of any optional life annuity if greater).[21] This actuarial equivalence requirement does not impose a ceiling on the value of a QJSA. The regulations require only that the QJSA for a married participant be at least as valuable as alternative forms of plan benefit. Thus, a QJSA may be more valuable than alternative forms of benefit,[22] and the code expressly recognizes that employers may further increase the relative value of a QJSA by subsidizing it.[23]

A plan may provide that QJSA benefits are available to a surviving spouse only if (1) the participant has been married for a period of at least one year before the participant's death or divorce, and (2) the marriage period includes the annuity starting date.[24] If QJSA payments have begun but the participant's marriage terminates before meeting the one-year period, the plan may terminate the spouse's survivor benefits.

[11] Section 401(a)(11); 29 U.S.C. section 1055(a)-(b); and reg. section 1.401(a)-20, Q&A 3.

[12] Section 401(a) (last sentence); sections 411(e)(1), 414(d), 414(e); 29 U.S.C. section 1003(b)(1)-(2); and 29 C.F.R. section 2510.3-2(f).

[13] Other minor exceptions may also apply. For example, the spousal annuity requirements generally do not apply to plans allowing only employee contributions. Nor do they apply to the extent a plan provides for the payment of cash in lieu of an annuity worth $5,000 or less (excluding rollover contributions if the plan so provides). Section 401(a) (last sentence); sections 411(a)(11)(A) and (a)(11)(D); 411(e)(1)(C) and (e)(1)(D); 417(e)(1); and 29 U.S.C. section 1055(g).

[14] Section 417(b) and (c); 29 U.S.C. section 1055(d) and (e).

[15] Section 401(a)(11)(A); 29 U.S.C. section 1055(a).

[16] Section 417(b); 29 U.S.C. section 1055(d).

[17] Section 417(b)(1); 29 U.S.C. section 1055(d)(1).

[18] Section 401(a)(14)(B); 29 U.S.C. section 1056(a)(2).

[19] Section 401(a)(14)(A); 29 U.S.C. section 1056(a)(1).

[20] Section 401(a)(14)(C); 29 U.S.C. section 1056(a)(3).

[21] Section 417(b)(2); 29 U.S.C. section 1055(d)(2); and reg. sections 1.401(a)-11(b)(2) and 1.401(a)(4)-12.

[22] Reg. section 1.401(a)-20, Q&A 16.

[23] Section 417(a)(5); 29 U.S.C. section 1055(c)(5).

[24] Section 417(d); 29 U.S.C. section 1055(f); and reg. section 1.401(a)-20, Q&A 25(b)(2).

Qualified Pre-Retirement Survivor Annuity

If a plan participant dies before his or her annuity starting date (generally, before retirement) and the spousal annuity rules apply, a qualified retirement plan must provide the surviving spouse with a qualified pre-retirement survivor annuity (QPSA).[25] A QPSA is an annuity payable to the surviving spouse for his or her lifetime. The amount and timing of QPSA payments depend on (1) whether the plan is a defined benefit plan,[26] and (2) whether the participant's death occurs after his or her earliest retirement age.[27] The earliest retirement age is the earliest date the participant could elect to receive retirement benefits.[28] Depending then on the type of plan and the participant's earliest retirement age, a surviving spouse's QPSA will fall into one of the following three categories:

4. *The qualified retirement plan is a defined benefit plan and the participant's death occurs after the participant's earliest retirement age*: The QPSA is determined as if the participant had retired one day before death with a hypothetical QJSA starting immediately. The surviving spouse is then entitled to QPSA payments in an amount ranging from 50 percent to 100 percent of the payments the participant would have received under the hypothetical QJSA if the participant had lived. The exact percentage is determined by the terms of the plan.[29]
5. *The plan is a defined benefit plan and the participant's death occurs on or before the participant's earliest retirement age*: The QPSA is determined as if the participant had not died but had merely separated from service at death (or actual separation if earlier), surviving thereafter to receive a hypothetical QJSA starting on the participant's earliest retirement date. Then, based on the further assumption that the participant died the day after his or her earliest retirement date, the surviving spouse receives payments ranging from 50 percent to 100 percent of the QJSA payments the participant would have received. The exact percentage is determined by the terms of the plan.[30]
6. *The plan is a defined contribution plan*: The QPSA is a lifetime annuity for the spouse with a specified minimum present value. The minimum value is an amount that is at least 50 percent of the non-forfeitable balance of the participant's plan account. However, the terms of the plan may provide a QPSA with a value greater than the minimum.[31]

Under (1) and (2) above, the hypothetical QJSA must be actuarially equivalent to a lifetime annuity payable to the participant alone. The plan applies this requirement by ignoring the participant's death and assuming the participant had a normal life expectancy.[32] A plan may provide that a QPSA is available only if the participant has been married to the surviving spouse for a period of at least one year before the participant's death.[33]

Waiver of a QJSA or QPSA

A participant may generally waive a QJSA only during the 180-day period immediately preceding the annuity starting date. For this purpose, the annuity starting date generally does not occur until the plan is obligated to start the annuity (for example, on the participant's normal retirement date). Thus, if a participant taking early retirement may choose when to start his or her annuity, the annuity starting date for purposes of identifying the waiver period is generally the earlier of the date the participant chooses or the normal retirement date.[34]

[25] Section 401(a)(11)(A)(ii); 29 U.S.C. section 1055(a)(2).

[26] Section 414(i) and (j).

[27] Section 417(c); 29 U.S.C. section 1055(d).

[28] Reg. section 1.401(a)-20, Q&A 17.

[29] Section 417(c)(1)(A)(i); 29 U.S.C. section 1055(e)(1)(A)(i); and reg. section 1.401(a)-20, Q&A 18.

[30] Section 417(c)(1)(A)(ii); 29 U.S.C. section 1055(e)(1)(A)(ii); and reg. section 1.401(a)-20, Q&A 18.

[31] Section 417(c)(2); 29 U.S.C. section 1055(e)(2).

[32] Sections 417(c)(1)(A)(i) and (c)(1)(A)(ii), 417(b); and 29 U.S.C. sections 1055(e)(1)(A)(i) and (e)(1)(A)(ii), 1055(d).

[33] Section 417(d)(1); 29 U.S.C. section 1055(f)(1); and reg. section 1.401(a)-20, Q&A 25(b)(2)(i).

[34] *Shields v. Reader's Digest Association Inc.*, 331 F.3d 536 (6th Cir. 2003).

A participant may generally waive a QPSA after the earlier of (1) the first day of the plan year the participant reaches age 35, or (2) the date the participant separates from service. If the plan allows, a participant may also waive a QPSA before age 35, even if the participant does not separate from service; however, a new waiver is then required after age 35.[35]

Any QJSA or QPSA waiver by a participant requires spousal consent. The consent must be in writing, it must acknowledge aspects of the consent that are adverse to the spouse, and a plan representative or notary public must witness it.[36] A participant may revoke a previous waiver of (1) a QJSA during the 180-day period immediately before the annuity starting date,[37] and (2) a QPSA at any time during the participant's lifetime.[38]

After a participant's waiver of a QJSA, most plans allow the participant to choose from an array of alternative forms of retirement benefit, if the participant's choice is consistent with conditions placed by the spouse on his or her consent to the waiver.[39]

Seeking a QDRO After Retirement and After the Start of a QJSA

As explained above, the retirement benefit for a married participant is normally a QJSA, consisting of a lifetime annuity for the participant and, on the participant's death, an annuity for the life of the participant's spouse. To qualify, the spouse must have been married to the participant on the participant's annuity starting date.[40] (For ease of discussion in the rest of this article, assume a participant's annuity starting date is the participant's retirement date, unless otherwise indicated.)

Despite the QJSA rights described above, a former spouse of the participant (or a child or other dependent) may be able to obtain a QDRO that requires payment of benefits to the former spouse or other payee that would otherwise have been paid to the participant during his or her lifetime.[41] Also, the QDRO can give to the former spouse the plan's survivor benefits that would otherwise have been paid to the current spouse,[42] if the former spouse obtains the QDRO before the start of QJSA payments to the participant.[43]

On the other hand, it is highly unlikely a former spouse would be able to obtain survivor benefits under a QDRO filed with the plan after the start of QJSA payments to the participant. The Fourth and Fifth circuits and the Minnesota Supreme Court have all held that such a QDRO cannot give a former spouse any interest in the QJSA survivor benefits held by the current spouse of the participant. The courts reasoned that the QJSA survivor benefits vest in the participant's current spouse as of the date of the participant's retirement, leaving nothing for the former spouse.[44]

As support for their vesting conclusion, the courts cited the certainty and finality of the current spouse's interest in the QJSA, as evidenced by the statutory prohibition of post-retirement waivers of the QJSA. The courts noted that under the statutory scheme, the QJSA interest held by the spouse who was married to the participant on the date of the participant's retirement was not contingent on the spouse's remaining married to the participant thereafter.[45] Finally, one court cited the actuarial and administrative convenience gained from the certainty provided by vesting.[46]

Interestingly, the vesting of a QJSA can work against not only a former spouse but also a subsequent spouse. In a Ninth Circuit case, the plan participant was married to his eighth wife when he retired and began receiving payments

[35] Section 417(a)(1)(A)(i) and (a)(6); 29 U.S.C. section 1055(c)(1)(A)(i) and (e)(7); and reg. section 1.401(a)-20, Q&A 33(b).

[36] Section 417(a)(2)(A)(iii); 29 U.S.C. section 1055(c)(2)(A)(iii).

[37] Section 417(a)(1)(A)(ii) and (a)(6)(A); 29 U.S.C. section 1055(c)(1)(A)(ii) and (c)(7)(A).

[38] Section 417(a)(1)(A)(ii) and (a)(6); 29 U.S.C. section 1055(c)(1)(A)(ii) and (c)(7).

[39] Section 417(a)(1)(A)(i); 29 U.S.C. section 1055(c)(1)(A)(i).

[40] Section 417(b).

[41] Section 414(p)(1); and *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997).

[42] The regulations provide that to the extent a QDRO treats a former spouse as the participant's spouse, a current spouse cannot be treated as the participant's spouse. Reg. section 1.401(a)-13(g)(4)(i)(B).

[43] Section 414(p)(5).

[44] *Hopkins*, 105 F.3d 153; *Rivers v. Central and Southwest Corp.*, 186 F.3d 681 (5th Cir. 1999); and *Langston v. Wilson McShane Corp.*, 828 N.W.2d 109 (Minn. 2013).

[45] Section 417(a)(1)(A)(i); *Hopkins*, 105 F.3d 153 (4th Cir. 1997); *Rivers*, 186 F.3d 681; and *Langston*, 828 N.W.2d 109.

[46] *Langston*, 828 N.W.2d 109.

under his QJSA. He later divorced his eighth wife and married his ninth wife. When he died, his ninth wife sought the life annuity under the QJSA. The court held, though, that the survivor portion of the QJSA vested irrevocably with the participant's eighth wife, who was married to the participant at the time of his retirement.[47]

Qualification of a DRO Filed With the Plan Before Retirement

It is clear that a DRO received and approved by a plan as a QDRO before a participant's retirement can give a former spouse an interest in survivor benefits that supersedes the QJSA interest of a current spouse.[48] However, it is highly unlikely that the result would be the same if the former spouse merely obtained a DRO from a state court without filing it with the plan until after the participant's retirement. In the Minnesota Supreme Court case, the former spouse actually obtained a DRO before the participant's retirement. However, she did not succeed in obtaining a QDRO granting survivor benefits because she did not file the DRO with the plan until after retirement.[49]

On the other hand, a post-retirement QDRO granting survivor benefits should be valid if the DRO was filed with the plan before the participant's retirement, even though the plan could not or did not determine whether the DRO was "qualified" until after retirement. To facilitate the qualification process for a DRO filed before retirement, the tax law requires the plan to separately account for and segregate benefits for an 18-month period beginning with the date annuity payments would otherwise start.[50] Thus, in the case of survivor benefits under a QSJA, the 18-month "hold" period generally could not begin before the start of payments to the participant (that is, generally beginning at his or her retirement).[51] Thus, Congress appears to have anticipated that the qualification process for a DRO filed with a plan before retirement may extend well beyond retirement.

Further, there does not appear to be any policy justification for cutting off a plan's ongoing qualification process when the participant retires.[52] In a similar context, the federal circuit courts have cited the 18-month statutory hold on benefits as support for their holdings that post-death qualifications of DROs filed with a plan before death can result in valid QDROs.[53] The Ninth Circuit explained that the 18-month hold period was intended to provide time for amending the DRO to cure defects. The court said that arbitrarily cutting off that process at death or retirement would not result in reasonable outcomes. The validity of a QDRO might then become a matter of manipulation or mere fortune, even though the former spouse or other alternative payee had done all he or she could do by filing the DRO before the participant's death or retirement.[54]

A Hawaii Supreme Court case[55] provides a good example. In the Hawaii case, a former spouse filed a DRO with a plan before the participant's retirement. After examining the DRO, the plan notified the participant that the DRO did not qualify as a QDRO. The plan also made suggestions for qualifying the DRO, including a suggestion to add a claim for survivor benefits (all as part of the type of process contemplated by the QDRO statutes). The former spouse then submitted an appropriately amended DRO to the plan after the participant's retirement.

The Hawaii court held that the amended DRO was a post-retirement QDRO that overrode the

[47] *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010).

[48] Section 417(a)(1)(A)(i) and (b); *Hopkins*, 105 F.3d 153; *Rivers*, 186 F.3d 681; and *Langston*, 828 N.W.2d 109.

[49] *Langston*, 828 N.W.2d 109.

[50] Section 414(p)(7).

[51] Section 414(p)(7)(E). It is also possible the 18-month period would not begin until payment of survivor benefits are scheduled to start for the current spouse (for example, on the participant's death), if the QDRO does not cover lifetime payments to the participant. See the language of section 414(p)(7)(E).

[52] *Id.*

[53] *Yale-New Haven Hospital v. Nicholls*, 788 F.3d 79 (2d Cir. 2015); *Trustees of the Directors Guild of America — Producer Pension Benefits Plans v. Tise*, 234 F.3d 415 (9th Cir. 2000); *Hogan v. Raytheon*, 302 F.3d 854 (8th Cir. 2002); and *Files v. ExxonMobil Pension Plan*, 428 F.3d 478 (3d Cir. 2005).

[54] *Trustees of the Directors Guild of America*, 234 F.3d 415.

[55] *Torres v. Torres*, 60 P.3d 798 (Haw. 2002).

subsequent spouse's survivor benefits under a QJSA. Unfortunately, though, the court also unequivocally rejected the holdings and reasoning of the previous federal circuit court cases disqualifying QDROs that were obtained after retirement. The court need not have painted with such a broad brush. The court could have easily found the QDRO valid by distinguishing the circuit court cases and the Minnesota Supreme Court case on grounds that unlike the Hawaii case, the former spouses in those cases had submitted their DROs to the plans after retirement (and thus after vesting of the participant's QJSA).[56]

Thus, it seems reasonably clear that after retirement a plan may certify a DRO filed with the plan before retirement. However, it does not appear that a mere pre-retirement notice of a DRO (for example, in a letter) would allow a post-retirement QDRO to override QJSA survivor benefits. The plan's process for certifying a DRO cannot begin before the plan receives the actual DRO,[57] and as the cases discussed above indicate, receipt of the DRO after retirement is too late.

Treatment of Post-Retirement QDRO If Optional Spousal Annuity Elected

Qualified retirement plans must generally include a qualified optional survivor annuity (QOSA) among the benefit options available after the waiver of a QJSA. As with a QJSA, the QOSA is payable for the participant's lifetime and, after the participant's death, to his or her spouse for the spouse's lifetime. However, the amounts of the QOSA and QJSA payments are different.[58]

If the waived QJSA provides a surviving spouse with an annuity payment that is less than 75 percent of the annuity payment to the participant, the QOSA must provide for a payment to the spouse equal to 75 percent of the participant payment. If the QJSA provides the spouse with an annuity payment that is 75 percent or more of the annuity payment to the deceased participant, the QOSA must provide for a payment to the spouse equal to 50 percent of the participant payment.[59]

As with a QJSA, the present value of the expected future annuity payments to the participant and spouse under the QOSA must at least equal the present value of a lifetime annuity otherwise payable to the participant alone. Waiver of the QJSA and election of the QOSA does not require spousal consent, unless the value of the QOSA is less than the value of an otherwise available QJSA (for example, less than the value of a subsidized QJSA).[60]

As with a QJSA, it appears highly unlikely that a DRO filed with a plan after the participant's retirement could override a subsequent spouse's survivorship rights under a QOSA. That is, the rights of a subsequent spouse in a QOSA appear to vest in the spouse on the date of retirement to the same extent as they would have vested in a QJSA. The subsequent spouse's interest in the QOSA is certain and final, as evidenced by the inability to waive the QOSA after retirement.[61]

Further, the QOSA interest held by the subsequent spouse is not contingent on the spouse's remaining married to the participant until his or her death.[62] And the actuarial and administrative convenience of vesting is the same as with a QJSA.[63] Finally, the IRS has stated that a QOSA that is actuarially equivalent to an offered QJSA (whether or not the QJSA is subsidized) is also in effect a QJSA.[64]

On the other hand, as explained above regarding a QJSA, a QDRO should be valid against a QOSA if the underlying DRO was filed with the plan before the participant's retirement, even though the plan did not or could not determine that the DRO was qualified until after retirement.

[56] *Id.*

[57] Section 414(p)(7)(A).

[58] Section 417(a) and (g); 29 U.S.C. section 1055(c) and (i).

[59] Section 417(a) and (g); 29 U.S.C. section 1055(c) and (i).

[60] Section 417(g)(1)(B); Notice 2008-30, 2008-1 C.B. 638, Q&As 10 and 11.

[61] Section 417(a)(1)(A).

[62] Section 417. These are all factors cited by the courts to support their holdings that a QJSA vests at retirement. *Hopkins*, 105 F.3d 153; *Rivers*, 186 F.3d 681; *Langston*, 828 N.W.2d 109.

[63] *Langston*, 828 N.W.2d 109.

[64] Notice 2008-30, Q&A 11.

QDRO Filed After Retirement: No QJSA or QOSA

In some situations, a plan need not provide a QJSA or QOSA. As explained above, these spousal annuities are generally not required when (1) a plan is exempt from spousal annuity requirements, (2) the spouses have waived spousal annuities, or (3) the participant was not married when he or she retired.

In those situations, a QDRO obtained by a former spouse should be effective to confer survivorship benefits if available under the plan, whether the former spouse files the QDRO with the plan before or after retirement. The vesting-at-retirement arguments applicable to survivor benefits under QJSAs and QOSAs generally do not apply to other types of survivor benefits. That is, during his or her lifetime, a retired participant almost always has the right to change the beneficiary of survivor benefits, if any, that are not in the form of a QJSA or QOSA. Those other types of survivor benefits are just not statutorily hard-wired to vest at retirement.[65]

Seeking a QDRO After the Pre-Retirement Death of a Participant

If a QDRO is sought after the death of a participant, the residence or domicile of the plan participant and his or her former spouse may be significant factors in determining whether the former spouse can obtain a QDRO granting survivor benefits. That is, the federal circuit courts are split on the issue. In *Samaroo*,[66] the Third Circuit held that a posthumous QDRO granting survivor benefits was not valid because it would violate the statutory prohibition of benefits that are in excess of those permitted by the plan.[67]

Later, in *Files*,[68] the Third Circuit held that *Samaroo* would not apply if the benefits sought were adequately described in a pre-death DRO. The court's holding was based in part on the theory that a pre-death DRO may grant a former spouse an "interest" in a retirement plan that the former spouse may then refine, even after the participant's death, until the DRO qualifies as a QDRO. But the court concluded that the plan interest (and thus the QDRO) will include survivor benefits only if those benefits are adequately described in the DRO before the participant's death.

On the other hand, appellate courts in four other federal circuits have enforced the grant of survivor benefits in QDROs obtained after the pre-retirement deaths of participants, even though there were no pre-death DROs granting survivor benefits. The Tenth Circuit[69] expressly declined to follow *Samaroo*. The other three circuit court cases did not even discuss the issue. It was enough that the posthumous QDROs met all the usual statutory requirements.[70]

Some of the retirement plans in the cases recognizing post-death QDROs may have received some type of pre-death notice of a DRO (for example, a letter). However, none of those cases indicated that there was a requirement that a former spouse file some type of notice or DRO with the plan before the death of the participant.[71] In fact, one case denied that there was any such requirement,[72] and another case expressly stated by footnote that it was not deciding the question.[73]

Further, in *Patton*,[74] when a pre-death notice of a DRO had been filed for one plan, the Tenth Circuit allowed a posthumous QDRO for a second overlooked plan even though no pre-death notice or DRO had been issued for the overlooked plan. Also, an example in the Labor Department regulations flatly states that a DRO issued after death may become qualified even if no previous DRO had been issued.[75]

Nearly all the favorable cases decided by the circuit courts have considered it significant that state courts issued their posthumous QDROs

[65] See section 417(a)(1)(A) for the statutory support for vesting of QJSAs and QOSAs.

[66] *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999).

[67] *See* section 414(p)(3)(B).

[68] *Files v. ExxonMobil Pension Plan*, 428 F.3d 478 (3d Cir. 2005).

[69] *Patton v. Denver Post Corp.*, 326 F.3d 1148 (10th Cir. 2003).

[70] *Yale-New Haven Hospital*, 788 F.3d 79; *Hogan*, 302 F.3d 854; *Trustees of the Directors Guild of America*, 234 F.3d 415.

[71] *Yale-New Haven Hospital*, 788 F.3d 79; *Hogan*, 302 F.3d 854; *Files*, 428 F.3d 478; and *Trustees of the Directors Guild of America*, 234 F.3d 415.

[72] *Files*, 428 F.3d 478.

[73] *Trustees of the Directors Guild of America*, 234 F.3d 415.

[74] *Patton*, 326 F.3d 1148.

[75] 29 C.F.R. section 2530.206(c)(2), Example 1.

nunc pro tunc (that is, retroactive to the original DRO or divorce decree).[76] Although the Eighth Circuit held a posthumous QDRO valid without indicating whether the QDRO was a *nunc pro tunc* order,[77] it would nonetheless seem prudent to issue any such QDROs *nunc pro tunc*.

Recently, in an unusual and unpublished case, *Garcia-Tatupu v. Bell*,[78] the First Circuit affirmed a district court decision denying survivor benefits purportedly granted to the former spouse by a post-death QDRO. The benefits sought in a pre-death DRO failed to include survivor benefits. Also, the former spouse had expressly waived any rights not set forth in the DRO. The appellate court's unpublished per curiam opinion essentially adopted the district court's opinion, which in turn followed the Third Circuit's *Samaroo* case (as limited by *Files*). Thus, the court effectively rejected the favorable opinions in the other federal circuits.

In its opinion, the district court made a distinction between (1) a DRO that gave a former spouse only a share of any plan payments actually received by the participant, as in *Samaroo*, and (2) a DRO that gave a former spouse a "separate interest" in the plan, as in *Files*. The court said the former situation foreclosed a post-death grant of survivor benefits in a QDRO, while the latter did not foreclose it. The court concluded that the DRO gave the former spouse only a share of any actual plan payments received and thus could not be expanded to include survivor benefits in a post-death QDRO.

Both the appellate court and the district court seemed to be swayed by the equities involved. They seemed uncomfortable with the fact that the former spouse was claiming survivor benefits after the death of the participant when she had affirmatively negotiated away those benefits while the participant was still alive. Changing course after the death of the participant looked too much like an unjustified raid on the pension plan's funds. Compare the parties' relative equities in the *Patton* case in which the Tenth Circuit, perhaps more justifiably, allowed a posthumous QDRO for a plan the former spouse did not even know existed before the participant's death (because the employer failed to reveal its existence).

In any event, the First Circuit's per curiam opinion is unpublished and does not constitute precedent. Thus, the First Circuit is still free to reject the *Samaroo* rationale and, in a future case, follow the majority of the federal circuits that have dealt with post-death QDROs. Whether it will is an open question.

Conclusion

To avoid the uncertainties in the case law and having to deal with the effect of the subsequent death or retirement of the participant, a divorcing spouse should try to obtain a QDRO as soon as possible in the divorce proceeding. Further, the spouse should make sure the QDRO expressly grants survivor benefits to him or her, in addition to an appropriate share of benefits paid during the lifetime of the plan participant. ■

[76] *Files*, 428 F.3d 478; *Patton*, 326 F.3d 1148; *Yale-New Haven Hospital*, 788 F.3d 79; and *Trustees of the Directors Guild of America*, 234 F.3d 415.

[77] *Hogan*, 302 F.3d 854.

[78] *Garcia-Tatupu v. Bell*, No. 17-2179 (1st Cir. 2019) (unpublished per curiam opinion), *aff'g*, 296 F. Supp. 3d 407 (D. Mass. 2017). *See same case*, *Garcia-Tatupu v. Bell*, 249 F. Supp. 3d 570 (D. Mass. 2017).